

CC Docket No. 95-116

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February 8, 2005

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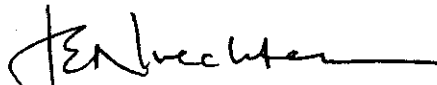
Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Petition of SBC Communications Inc. For Forbearance Under
47 U.S.C. § 160(c) From the Application of the Five-Year
Recovery Period for Local Number Portability Costs
Under 47 C.F.R. § 52.33(a)(1)

Dear Ms. Dortch:

Enclosed for filing please find an original and four copies of Petition of SBC Communications Inc. for Forbearance in the above-referenced proceeding. I am also providing an additional copy to be file-stamped and returned to me.

Please do not hesitate to contact me at 202.663.6850 should you have any questions.


Jonathan E. Nuechterlein

Enclosures

Not a Contract ot/
Under AGP 102

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Petition of SBC Communications Inc.)
For Forbearance Under 47 U.S.C. § 160(c))
From the Application of the)
Five-Year Recovery Period for)
Local Number Portability Costs)
Under 47 C.F.R. § 52.33(a)(1))

CC Docket No 95-116
~~WC Docket No. 05-~~

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Federal Communications Commission
Office of Secretary

PETITION OF SBC COMMUNICATIONS INC. FOR FORBEARANCE

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February 8, 2005

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CC *95-116*
~~WE~~ Docket No. ~~05~~

PETITION OF SBC COMMUNICATIONS INC. FOR FORBEARANCE

Pursuant to 47 C.F.R. § 1.53 and 47 U.S.C. § 160(c), SBC Communications Inc. ("SBC") hereby petitions the Commission to forbear from enforcing its rule limiting SBC's ability to recover its costs for implementing local number portability ("LNP") to a five-year period. Specifically, SBC asks that the Commission forbear from applying 47 C.F.R. § 52.33(a)(1) to the extent it would bar SBC from continuing to assess end-user charges for a limited time until SBC has fully recovered the total amount of LNP costs that the Commission has authorized it to collect.¹ Eliminating this barrier to recovery and allowing SBC to take the steps to recover these costs are necessary (i) to effectuate the Commission's statutory obligation to ensure that all

¹ SBC seeks this relief on behalf of the Ameritech Operating Companies ("Ameritech"), Pacific Bell, and Southwestern Bell Telephone Company ("SWBT") (collectively, the "SBC ILECs").

carriers bear the costs of establishing number portability in a competitively neutral manner and (ii) to comply with the statutory forbearance criteria.²

INTRODUCTION AND SUMMARY

The Communications Act requires the Commission to develop a competitively neutral mechanism for enabling carriers to recover the considerable costs they incur to comply with number portability obligations. While the Commission entitled CLECs (the principal beneficiaries of number portability) to recover those costs however they wish, it limited ILECs to assessing a federally tariffed charge on end users for five years, subject to change only upon proof that the charge "was not reasonable based on the information available at the time it was initially set."³

In 1999, the Commission authorized SBC to recover total LNP costs of \$1.275 billion and approved a corresponding end-user charge over the prescribed five-year period.⁴ This mechanism could result in adequate cost recovery, however, only if SBC accurately estimated

² SBC is simultaneously filing a separate petition asking in the alternative that the Commission, under 47 C.F.R. § 1.3, waive section 52.33(a)(1) of its rules to the extent necessary to allow SBC to recover the full amount of its approved number portability costs.

³ Third Report and Order, *Telephone Number Portability*, 13 FCC Rcd 11701, 11777 ¶ 144 (1998) ("*Third Report and Order*").

⁴ There is no dispute that SBC actually incurred these costs. In fact, as noted in the attached Declaration of John G. Connelly ("Connelly Decl."), SBC's preliminary analysis indicates that its actual LNP costs *exceeded* the \$1.275 billion figure. *See* Connelly Decl. ¶ 8. Assuming this petition is granted, SBC would not seek recovery of any such difference; it merely seeks recovery of the still-unrecovered portion of the \$1.275 billion itself. Further, SBC is not here even seeking the full amount of the shortfall between the Commission-approved figure and the revenue it collected through end-user charges assessed during the prescribed five-year recovery period. SBC has deducted from that amount \$37 million that it did not collect in light of restrictions in its contracts with certain customers or due to billing errors. *See id.* ¶¶ 10-11.

the number of access lines over which it would spread that per-subscriber charge. In preparing its estimate, SBC reasonably projected year-over-year access line growth over the five-year recovery period. That projection followed directly from long historical experience: like other ILECs, SBC had seen continuous growth in access lines *every single year* since the Great Depression, and that growth had actually accelerated in the years just after passage of the 1996 Act.

This projection, however, proved to be quite inaccurate. After two years of continued growth, albeit at a slower pace, SBC's access lines began declining for the first time in seventy years. Moreover, the rate of decline accelerated dramatically over each of the final three years of the recovery period. As a result, SBC experienced one of the sharpest reversals in the industry, experiencing a higher-than-average rate of access line growth during the years immediately *preceding* the recovery period and then a higher-than-average rate of net loss in access lines *during* the recovery period. This sharp and unprecedented reversal was attributable to a number of unforeseen circumstances, including the explosive surge of wireless and broadband services, the bursting of the high-tech bubble, and the overall decline in the economy. Its effect on SBC's ability to recover its number portability costs was significant: at the end of the five-year period, SBC had failed to recover \$211 million of its approved number portability costs — a 17% shortfall.

The Commission should now forbear from applying the five-year limitation on the recovery period to allow SBC to correct this underrecovery and recoup its approved LNP costs. Indeed, the Commission has waived cost-recovery time limitations for other carriers whose rationale for such relief — in Sprint's case, outright *negligence* in its original line count — is far less compelling than SBC's justification here. It would be arbitrary and legally indefensible for

the Commission to reward such negligence while penalizing a carrier that, like SBC, had no reasonable basis for anticipating that the number of its access lines would decrease for the first time in seventy years. Indeed, even if SBC *had* anticipated that decrease and had tried to reflect it through higher end-user charges in the first place, the Commission would have rejected that request on the ground that it was then too speculative. And a failure to grant SBC relief in these circumstances would thwart the statutory requirement of competitive neutrality by placing SBC at a substantial disadvantage relative to other carriers that were allowed to recover their LNP costs, a disparity that would inevitably harm consumers by skewing competition.

For all of these reasons, enforcing the five-year limitation under these circumstances is not necessary to produce nondiscriminatory and reasonable rates and practices, to protect consumers, or to serve the public interest. To the contrary, forbearance from that limitation is necessary to avoid a legally indefensible departure from Commission precedent. This petition should therefore be granted.

BACKGROUND

1. Number portability refers to “the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.”⁵ Section 251(b)(2) of the Act requires all local exchange carriers “to provide, to the

⁵ 47 U.S.C. § 153(30); *see also* Order, *Telephone Number Portability; BellSouth Corporation Petition for Declaratory Ruling and/or Waiver*, 19 FCC Rcd 6800, 6800-01 ¶ 2 (2004) (“*BellSouth Order*”) (“Number portability allows residential and business telephone customers to retain, at the same location, their existing local telephone numbers when switching from one telephone service provider to another.”).

extent technically feasible, number portability in accordance with requirements prescribed by the Commission.”⁶ Number portability was expected to operate, and has in fact operated, to the overwhelming advantage of new entrants, because it enables consumers to keep their phone numbers after canceling service with their existing telephone company — which, during the period in question, was usually the ILEC. To implement the number portability directive, the Commission issued rules in 1996 requiring all LECs to provide long-term number portability in the 100 largest metropolitan statistical areas (“MSAs”) according to a phased deployment schedule that began on October 1, 1997, and concluded on December 31, 1998.⁷

This mandate imposed very substantial costs on the telecommunications industry in the form of systems and equipment upgrades, and Congress directed the Commission to create a mechanism that would allow the costs of establishing number portability to be “borne by all telecommunications carriers on a competitively neutral basis.”⁸ The Commission accordingly introduced a system that, it claimed, would “ensure that all telecommunications carriers bear in a competitively neutral manner the costs of providing long-term number portability.”⁹ That

⁶ 47 U.S.C. § 251(b)(2).

⁷ First Report and Order and Further Notice of Proposed Rulemaking, *Telephone Number Portability*, 11 FCC Rcd 8352, 8393 ¶ 77 (1996) (“*First Report and Order*”). The Commission subsequently modified the deployment schedule to require number portability by March 31, 1998, within the 100 largest MSAs in switches for which another carrier has made a specific request for the provision of portability. First Memorandum Opinion and Order on Reconsideration, *Telephone Number Portability*, 12 FCC Rcd 7236 (1997).

⁸ 47 U.S.C. § 251(e)(2).

⁹ *Third Report and Order* at 11706 ¶ 8. These include costs that “(1) would not have been incurred by the carrier ‘but for’ the implementation of number portability; and (2) were incurred ‘for the provision of’ number portability service.” Memorandum Opinion and Order, *Telephone Number Portability Cost Classification Proceeding*, 13 FCC Rcd 24495, 24500 ¶ 10 (1998).

framework turned on the carrier's identity: while most telecommunications carriers were permitted to recover their LNP costs "in any lawful manner,"¹⁰ ILECs could recover them only through a federally tariffed, monthly charge assessed on end users.¹¹ This approach required each ILEC to estimate in advance its total costs for implementing number portability, which would then be "levelized" over a five-year period beginning on a date of the ILEC's choosing after February 1, 1999.¹² These measures, the Commission believed, would "ensure[] that [ILECs] have a reasonable opportunity to recover their costs."¹³ The Commission considered its disparate treatment of ILECs and non-ILECs to be competitively neutral on the grounds that it would "(1) not give one service provider an appreciable, incremental cost advantage over another service provider when competing for a specific subscriber, and (2) not disparately affect the ability of competing service providers to earn a normal return."¹⁴ Finally, the Commission provided that LECs could seek to alter the charges, once they were calculated and approved, but only upon proof "that the end-user charge was not reasonable based on the information available at the time it was initially set."¹⁵

¹⁰ *Third Report and Order* at 11707 ¶ 9; see also 47 C.F.R. § 52.33(b).

¹¹ *Third Report and Order* at 11707 ¶ 9, 11776 ¶ 142; see also 47 C.F.R. § 52.33(a)(1).

¹² *Third Report and Order* at 11776-77 ¶ 143. According to the Commission, this five-year limit reflected a balance between "enabl[ing] incumbent LECs to recover their portability costs in a timely fashion" and "help[ing] [to] produce reasonable charges for customers and avoid[ing] imposing those charges for an unduly long period." *Id.* at 11777 ¶ 144.

¹³ *Id.* at 11775 ¶ 139.

¹⁴ *Id.* at 11774 ¶ 136.

¹⁵ *Id.* at 11777 ¶ 144. The only sensible interpretation of this condition is that it gives an ILEC recourse if a charge calculated with reference to the information then available later turns out not to be reasonable. As discussed below, any other construction — in particular, one that

2. Pursuant to the Commission's instructions, the SBC ILECs filed tariffs on January 15, 1999, setting forth proposed end-user charges for the recovery of number portability costs effective February 1, 1999.¹⁶ In those tariff filings, the SBC ILECs identified a total of \$2.011 billion in number portability costs — \$639 million for the Ameritech Operating Companies ("Ameritech"), \$747 million for Pacific Bell, and \$625 million for Southwestern Bell Telephone Company ("SWBT") — with corresponding end-user charges of \$0.42, \$0.50, and \$0.48, respectively.

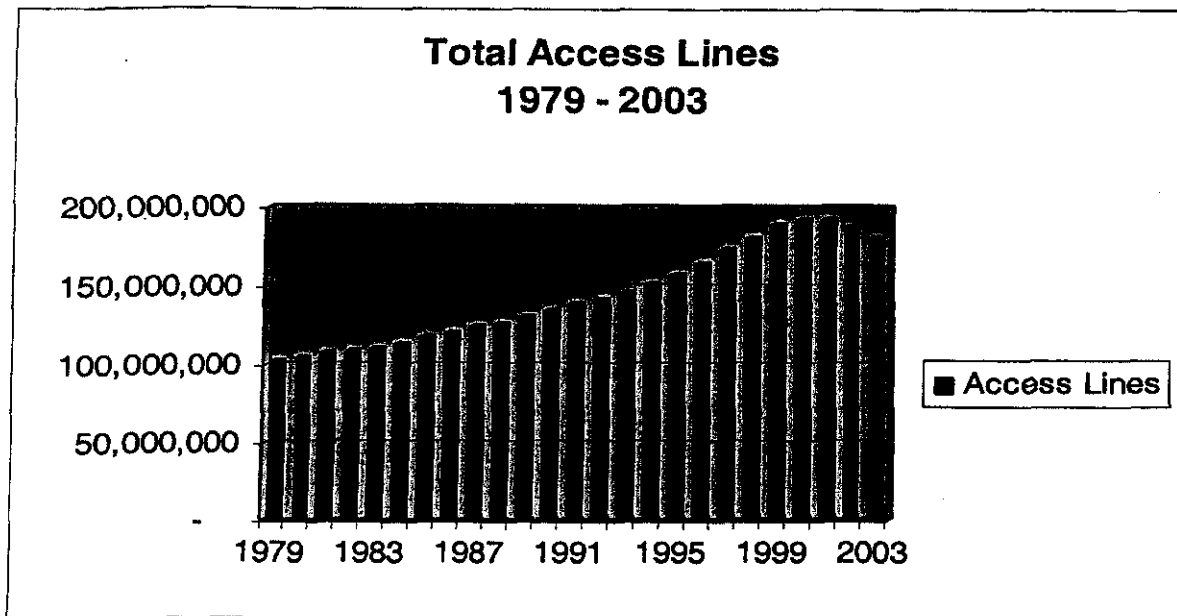
A critical component of these projections was the total number of access lines that SBC predicted it would serve during the five-year period over which the end-user charge would be assessed. SBC estimated that its number of access lines would increase by approximately 24% between 1999 to 2004. This estimate reflected projections that Ameritech's access lines would grow by approximately 19% (or 4.5% per year), Pacific Bell's by about 6% (or 1.4% per year), and SWBT's by about 49% (or 10.5% per year). These predictions were consistent with historic trends. At the time of SBC's original LNP cost-recovery tariff filing in February 1999, access lines had grown every year since 1933. Indeed, access line growth had accelerated rapidly, particularly in the Southwestern Bell territory, in the years immediately preceding 1999,

would perversely permit a remedy for ILEC underrecovery due to an ILEC's *negligence* but not to unforeseeable developments beyond its control — would be patently arbitrary and capricious.

¹⁶ See Memorandum Opinion and Order, *Long-Term Number Portability Tariff Filings; Ameritech Operating Companies; GTE System Telephone Companies; GTE Telephone Companies; Pacific Bell; Southwestern Bell Telephone Co.*, 14 FCC Rcd 11883, 11884-85 ¶ 1 (1999) ("*SBC LNP Costs Order*"); see also Ameritech Operating Companies Tariff Transmittal 1186 (Jan. 15, 1999); Pacific Bell Tariff Transmittal 2029 (Jan. 15, 1999); Southwestern Bell Telephone Co. Tariff Transmittal 2745 (Jan. 15, 1999).

primarily due to overall economic growth as well as increased use of second lines for dial-up access to the Internet. Figure 1 shows that line growth just since 1979:

Figure 1: Industry Access Line Growth



Data Source:

1979 through 1983 access lines – Trends in Telephone Service; FCC: IADCCB July 1998

1984 through 1998 access lines – Trends in Telephone Service; FCC: IATD, WCB May 2002

1999 through 2003 access lines – Local Telephone Competition: Status as of December 31, 2003; FCC: IATD, WCB June 2004

After the Commission reviewed SBC's original tariffs and disallowed certain costs, the SBC ILECs filed revised tariffs identifying a total of \$1.275 billion in number portability costs, consisting of \$437,788,119 for Ameritech, \$403,795,241 for Pacific Bell, and \$433,686,024 for

SWBT.¹⁷ SBC incurred these costs, for the most part, to make it easier for SBC's competitors to win customers away from SBC. No one disputes that SBC reasonably incurred these costs; indeed, SBC appears to have incurred higher costs.¹⁸ The Commission found that the end-user charges established in the tariffs to enable SBC to recover those costs were "just and reasonable and, therefore, lawful."¹⁹ Accordingly, the Commission approved monthly end-user charges of \$0.28 for Ameritech, \$0.34 for Pacific Bell, and \$0.33 for SWBT, which SBC included on its customer bills through the applicable five-year recovery period ending on January 31, 2004.²⁰ In theory, these end-user charges, multiplied by SBC's projected number of customers over five years (as measured by the number of access lines), would yield the total amount of LNP costs that the Commission had authorized SBC to recover.

In fact, however, the assessment of these end-user charges over the designated five-year period has produced a shortfall of some \$211 million²¹ — fully 17% of SBC's approved and undisputed number portability costs. That is principally because SBC's number of access lines not only failed to *grow* as projected, but in fact *declined* since 1999. In particular, while SBC's

¹⁷ See *SBC LNP Costs Order* at 11885 ¶ 2; see also Ameritech Operating Companies Tariff Transmittal No. 1204 (May 27, 1999); Pacific Bell Tariff Transmittal No. 2056 (June 22, 1999); Southwestern Bell Telephone Co. ("SWBT") Tariff Transmittal Nos. 2764 and 2765 (June 21 and 23, 1999).

¹⁸ See *supra* note 4.

¹⁹ *SBC LNP Costs Order* at 11961 ¶ 165. The Commission itself prescribed an end-user rate for Ameritech, based on the tariffs it had filed. See *id.* at 11960-61 ¶ 163.

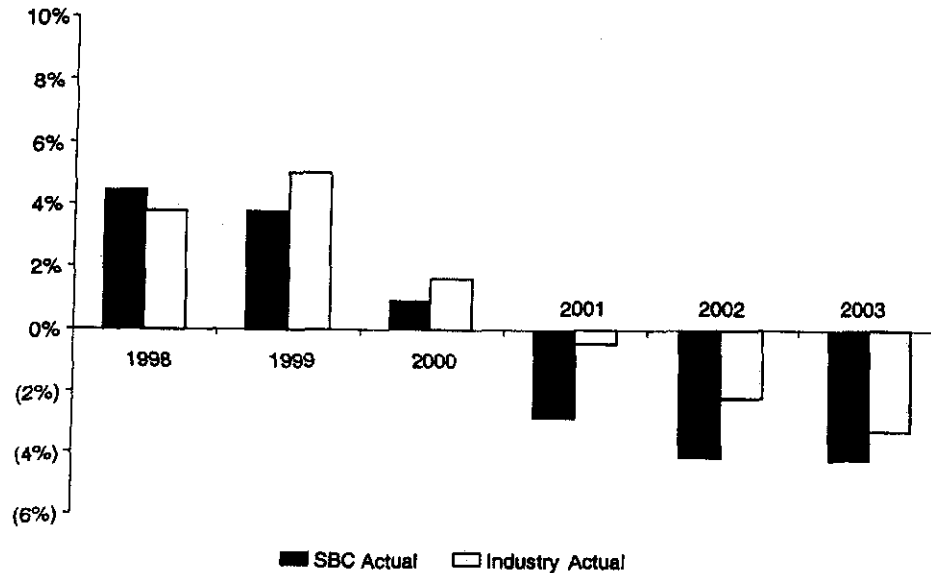
²⁰ SBC does not seek to recover costs associated with the territories served by Southern New England Telephone Company and Nevada Bell Telephone Company, where SBC believes that any underrecovery of LNP costs that may have occurred would be negligible compared to that experienced in other SBC service areas.

²¹ See Connelly Decl. ¶ 11.

access lines continued to increase in 1999 and 2000 as expected, the rate of growth for all ILECs, including SBC, slowed dramatically in 2000. Then, after nearly seventy consecutive years of access line growth, SBC encountered an unprecedented decline in access lines in 2001. This decline accelerated dramatically in 2002 and 2003, the last two years of the prescribed cost-recovery period.

Thus, instead of experiencing a cumulative 24% *increase* in access lines, as SBC and the Commission had assumed, SBC saw a cumulative 8% *decrease* in access lines from 1999 to 2004. This decline was attributable to a number of unforeseeable developments, including an explosive growth in wireless and broadband services, a corresponding decrease in second lines, an increase in competition generally, the bursting of the high-tech bubble, and a downturn in the overall economy. Although SBC was not the only ILEC to confront this unexpected turn of events, the typical ILEC did not confront a reversal as dramatic as SBC's (see Fig. 2):

Figure 2: Industry and SBC Actual Access Line Growth



SBC growth rates for 1998 and 1999 use CA and SWBT data. SBC growth rates for 2000-2003 use CA, SWBT, and AIT data.

Data Source of Industry Actual:

1997 through 1998 access lines – Trends in Telephone Service; FCC: IATD, WCB May 2002

DISCUSSION

I. FORBEARANCE IS NECESSARY TO AVOID A LEGALLY INDEFENSIBLE DEPARTURE FROM RECENT COMMISSION DECISIONS TO EXTEND THE LNP COST-RECOVERY PERIOD FOR LESS COMPELLING REASONS.

To remedy SBC's indisputable shortfall in the recovery of its approved LNP costs, the Commission should forbear from the five-year rule limiting the period over which ILECs can recover those costs through end-user charges. As discussed below, forbearing from that rule is necessary not just to meet the statutory requirement of competitive neutrality in the recovery of LNP costs, as explained in Part II of this petition, but also to avoid an irrational departure from past Commission decisions to waive cost-recovery limitations in circumstances where, if anything, the ILECs at issue were less obviously entitled to such relief than SBC is here.

As an initial matter, there is no disagreement that the Commission authorized SBC to recover a total of \$1.275 billion in LNP costs and that SBC actually incurred costs equal to (if not more than) that amount (and does not propose any changes to it here).²² Nor can there be any serious dispute that SBC is entitled to a “reasonable opportunity” to recover those costs, as the Commission’s precedent provides. The only question is whether the Commission should reflexively adhere to a five-year period now that unforeseen events have indisputably prevented SBC from recovering the full amount of its unquestioned LNP costs within that timeframe. Under the Commission’s recent decisions, it should not and, indeed, may not.

Twice this past year, the Commission waived its number portability cost-recovery rules to enable certain LECs to recover their LNP costs when the charges they had tariffed turned out to be inadequate. In December 2004, for example, the Commission permitted Sprint to continue charging end users beyond the timeframe prescribed in its tariff in order to cure an apparently negligent computational error that had led Sprint to overstate its demand and thus understate its LNP cost-recovery charge.²³ Among other things, the Commission concluded that, because there was no dispute that Sprint had underrecovered its costs, “the public interest weighs in favor of allowing Sprint to correct” that error.²⁴

Similarly, in April 2004, the Commission granted BellSouth’s request to waive the five-year limit to allow it and similarly situated carriers more time to recover costs associated with

²² See *supra* note 4.

²³ See Order, *Telephone Number Portability; Sprint Local Telephone Companies Petition for Waiver*, CC Docket No. 95-116, DA 04-3881, ¶ 2 (rel. Dec. 13, 2004) (“*Sprint Order*”).

²⁴ *Id.* ¶ 7.

implementing intermodal LNP.²⁵ In that case, the Commission determined that its originally approved charges were “unreasonably low” because they did not include costs associated with the implementation of intermodal LNP that were generally anticipated but “were not quantifiable” at that time.²⁶ Accordingly, the Commission not only waived the five-year limit but also allowed each affected carrier to “propose its own recovery period” so that it could “tailor a recovery period that best suits its own needs and those of its customers.”²⁷ The Commission determined that this approach would enable each carrier “to recover its costs in a timely fashion, help produce reasonable charges for customers, and avoid imposing such charges over an unduly long period.”²⁸

Despite contrary suggestions in the *Sprint Order*,²⁹ there is no reasonable or legally defensible basis for the Commission to deny SBC the same opportunity to correct its own underrecovery of LNP costs. First, the Commission could not rationally deny SBC that opportunity simply because SBC’s shortfall is attributable to unforeseen developments beyond its control, rather than (as in Sprint’s case) its own negligence. Granting Sprint’s request while denying SBC’s thus would effectively reward negligence and punish diligence, the exact

²⁵ See *BellSouth Order* at 6800 ¶ 1.

²⁶ *Id.* at 6809 ¶ 17.

²⁷ *Id.* at 6809 ¶ 18.

²⁸ *Id.*

²⁹ See, e.g., *Sprint Order* ¶ 7 (justifying an extension of the cost-recovery period for Sprint because Sprint “does not belatedly introduce any new or previously unknown data here for the first time” and instead “simply seeks to correct an unintentional error”); *id.* ¶ 6 (describing the rule allowing ILECs to modify an unreasonable end-user charge as a “narrow exception to the general rule that incumbent LECs may not increase LNP end-user charges”).

opposite of what regulation is supposed to do.³⁰ No court would uphold such a bizarre outcome. Second, like BellSouth and other ILECs that were “unable” to include the costs of intermodal LNP in their original end-user charges, SBC could not have predicted in 1999 the dramatic decline in ILEC access lines that occurred thereafter. Indeed, SBC likely could not have prevented its current shortfall even if it *had* speculated to the Commission in 1999 that, for the first time in seventy years, its line count would actually decrease over the next five years. As the *BellSouth Order* makes clear, the Commission “does not permit recovery of speculative costs, and, to the extent that any carrier sought such recovery [in the LNP context], it was rejected.”³¹ In short, there is no rational basis for distinguishing the relief sought here from the relief sought and granted in the *Sprint* and *BellSouth* orders; to the contrary, the case for granting such relief is most compelling here. Accordingly, any failure to treat these situations similarly would be arbitrary and capricious.³²

³⁰ See, e.g., Memorandum Opinion and Order, *Advanced Communications Corporation, Application for Extension of Time to Construct, Launch and Operate a Direct Broadcast Satellite System*, 10 FCC Rcd 13337, 13343 ¶ 21 (1995) (finding that it would “contravene the public interest” to extend a company’s timeframe for completing the construction of satellites using public funds, because it would “reward . . . inaction or failure to comply with implementation milestones”); Decision, *Applications of Mark L. Wodlinger and BHC Associates, LP for Construction Permit for a New Television Station*, 3 FCC Rcd 3139, 3144 ¶ 23 (1988) (denying an application to construct and operate a new television station where the applicant’s current facilities violated applicable regulations, and concluding that “[t]o reward [the applicant’s] gamesmanship . . . over a competitor whose site was in compliance from the outset would be unfair to those applicants duly complying with our rules”).

³¹ *BellSouth Order* at 6807-08 ¶ 13.

³² See, e.g., *Garrett v. FCC*, 513 F.2d 1056, 1060 (D.C. Cir. 1975) (holding that an agency “cannot act arbitrarily nor can it treat similar situations in dissimilar ways” and remanding the case to the agency “when it did not take pains to reconcile an apparent difference in the treatment accorded litigants circumstanced alike”) (quoting *Herbert Harvey, Inc. v. NLRB*, 424 F.2d 770,

Quite apart from that consideration, the Commission could not deny the relief sought here without independently contradicting its stated rationale, in the recent *Core Forbearance Order*, for forbearing from certain reciprocal compensation rules.³³ In 2001, the Commission adopted rules limiting the compensation carriers could collect on ISP-bound traffic to prevent the market distortions that arose when carriers targeted ISPs as customers and thereby engineered increased compensation from dial-up traffic.³⁴ In the *Core Forbearance Order*, however, the Commission eliminated certain of those rules on the premise that “[m]arket developments since 2001 have eased the concerns about growth of dial-up ISP traffic that [had] led the Commission to adopt [them].”³⁵ To support that premise, the Commission relied entirely on one industry report finding that “the *number of end users* using conventional dial-up to connect to ISPs is declining as the number of end users using broadband services to access ISPs grows.”³⁶

The Commission cannot consistently or lawfully deny forbearance here while granting it there. The Commission’s stated basis for relaxing its reciprocal compensation rules was an

780 (D.C. Cir. 1969)). Furthermore, disparate agency action cannot be justified simply by citing factual differences between two cases; rather, the agency “must explain their relevance to the purposes of the legislation it administers.” *Id.* (internal quotation marks and citation omitted).

³³ Order, *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, WC Docket No. 03-171, ¶ 1 (rel. Oct. 18, 2004) (“*Core Forbearance Order*”). Specifically, the Commission decided to forbear from applying the growth caps (which limit the number of ISP-bound minutes for which a carrier can claim compensation) and its new market rule (which requires providers who were not exchanging ISP-bound traffic prior to the enactment of these rules to exchange it going forward on a bill-and-keep basis). See *id.* ¶¶ 7, 9.

³⁴ *Id.* ¶¶ 7, 9.

³⁵ *Id.* ¶ 20.

³⁶ *Id.* ¶ 20 (emphasis added).

unexpected loss of dial-up connections as end users migrated from dial-up to broadband.

Whether or not that development could logically justify the result in the *Core Forbearance Order*,³⁷ this is the *same* unexpected loss of dial-up connections — and thus of second lines — that caused much of SBC's *line loss* during the same period and therefore its underrecovery of LNP costs.³⁸ The Commission cannot rationally correct its empirical predictions as the basis for forbearing from reciprocal compensation rules while, at the same time, holding SBC to *those same* empirical predictions as its basis for *declining* to forbear from its timetable for LNP cost recovery. Any such inconsistency, just like a departure from the waiver decisions discussed above, would “display evident disregard for [the Commission’s] precedents” and accordingly be

³⁷ SBC has sought reconsideration of the *Core Forbearance Order* on the ground that, even if the number of dial-up *end users* has declined, the total number of dial-up *minutes* has not, and the relevant number for reciprocal compensation purposes is minutes, not end users. See Petition for Reconsideration of SBC Communications Inc., *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, WC Docket No. 03-171, at 6-8 (filed Nov. 17, 2004). As SBC has explained, the record in that proceeding makes clear that dial-up minutes have actually increased since 2001 — despite declining subscribership in dial-up services — due to increased usage by this smaller subscriber base. Of course, the number of dial-up minutes has no impact on SBC's ability to recover its LNP costs through end-user charges, since those charges are assessed on access lines regardless of the extent of their use.

³⁸ Customers that migrate from dial-up to broadband for their Internet access are likely to cancel (or never order) second lines into the home, for broadband enables them for the first time to use their primary voice line at the same time they are connected to the Internet. See, e.g., Ninth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 19 FCC Rcd 20597 ¶ 213 n.579 (2004) (“Total residential access lines can decline without wireline customers ‘cutting the cord’ completely, as customers can replace additional residential lines (‘second lines’) with DSL, cable broadband, or wireless connections.”); *Lawmakers Examine Competition in Communications Marketplace*, ELECTRONIC COMMERCE NEWS, Feb. 16, 2004, available at 2004 WL 62302745 (noting “a decline in second lines as consumers abandon them for a broadband connection”).

arbitrary and capricious.³⁹ More generally, such action would be flatly inconsistent with the Commission's "continuing obligation to practice reasoned decision-making."⁴⁰

II. THE SECTION 10 CRITERIA REQUIRE FORBEARANCE.

Section 10 of the Communications Act requires the Commission to forbear from applying any regulations that are (1) "not necessary to ensure that . . . charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory," (2) "not necessary for the protection of consumers," and (3) not consistent with "the public interest."⁴¹

For the reasons discussed here and in Part I above, strict application of the five-year limit to SBC is wholly unnecessary to satisfy any of these criteria. First, applying that rule to SBC under these circumstances is unnecessary to ensure that telecommunications services are offered in a just, reasonable, and nondiscriminatory manner. The Commission has already authorized

³⁹ *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361, 366 (D.C. Cir. 1987); *see also Garrett*, 513 F.2d at 1060 ("[A]gency action cannot stand when it is 'so inconsistent with its precedents as to constitute arbitrary treatment amounting to an abuse of discretion.'") (quoting *Herbert Harvey*, 424 F.2d at 780).

⁴⁰ *Cellnet Communications, Inc. v. FCC*, 149 F.3d 429, 442 (6th Cir. 1998) (concluding that, "in accordance with its continuing obligation to practice reasoned decision-making," the Commission would have to revisit its rules relating to the resale of wireless mobile service if the "predictions" on which they are based "do not materialize"); *see also, e.g., Aeronautical Radio v. FCC*, 928 F.2d 428, 445 (D.C. Cir. 1991) ("[S]hould the Commission's predictions . . . prove erroneous, the Commission will need to reconsider [its rules] in accordance with its continuing obligation to practice reasoned decisionmaking."); Memorandum Opinion and Order, *Petition of SBC Communications Inc. for Forbearance From Structural Separation Requirements of Section 272 of the Communications Act of 1934, as Amended, and Request for Relief to Provide International Directory Assistance Services*, 19 FCC Rcd 5211, 5223 ¶ 19 n.66 (2004) (noting that carriers are "free to file petitions with the Commission" if "circumstances have changed" in a way that requires changes to existing rules).

⁴¹ 47 U.S.C. § 160(a).

SBC's recovery of \$1.275 billion in LNP costs, and SBC does not seek here to recover anything other than the difference between that amount and the amount SBC recovered from the approved end-user charges during the prescribed five-year period. Indeed, denying SBC the ability to recover these costs, while nonetheless allowing SBC's competitors to recover their costs, would produce an outright competitive disparity between SBC and the carriers on whose principal behalf SBC incurred these LNP costs in the first place. *That* outcome, not the forbearance sought here, would produce "unreasonably discriminatory" rates and practices.

Second, enforcing the five-year limit against SBC in these circumstances is unnecessary to protect consumers. Neither the Act nor the Commission's rules require carriers to implement local number portability for free. Forbearance from the five-year limitation on cost recovery will simply allow SBC to recover the LNP costs it indisputably incurred to promote competition (to itself) for the *benefit* of consumers. In fact, if anything, senselessly applying that limitation in the face of these changed circumstances would *harm* consumers, for SBC would then have to compensate for the resulting shortfall through some other means, such as by diverting resources otherwise earmarked for product and service development or by modifying the prices or terms of its existing offerings (as permitted by applicable tariffs and regulations). Either course would work to consumers' detriment. More generally, consumers suffer whenever regulatory policies create competitive disparities that distort efficient markets.

Third, relaxation of the five-year limitation period is wholly consistent with the public interest, as the Commission has already explicitly found in circumstances that, as discussed in

Part I, presented even less compelling justifications for such relief.⁴² Allowing non-ILECs to recover all of their LNP costs while denying ILECs such as SBC the same opportunity would defy the Act's directive that such costs be "borne by all telecommunications carriers on a competitively neutral basis."⁴³ In particular, inflexible adherence to the five-year limitation would violate both of the Commission's criteria for determining when cost recovery is competitively neutral, because it would 1) "give one service provider an appreciable, incremental cost advantage over another service provider when competing for a specific subscriber," and 2) "disparately affect the ability of competing service providers to earn a normal return."⁴⁴ As the Commission explained in the *BellSouth Order*, "[w]e agree that precluding carriers subject to rate regulation from recovering their intermodal LNP costs, while allowing other carriers to recover such costs, would not be competitively neutral and thus would violate the statutory mandate."⁴⁵ And adherence to the law itself is itself a compelling public interest, as is the principle of competitive neutrality embodied in it.

Finally, forbearance would not undermine the essential *purpose* underlying the rule that number portability costs be recovered within five years. The objective of that limitation was to avoid an "unduly long period" of cost recovery,⁴⁶ and, in particular, to avoid increasing interest

⁴² See *BellSouth Order* at 6809 ¶ 15.

⁴³ 47 U.S.C. § 251(e)(2).

⁴⁴ *Third Report and Order* at 11727 ¶ 42.

⁴⁵ *BellSouth Order* at 6808 ¶ 15.

⁴⁶ *Id.* at 6806-07 ¶ 12.

costs by prolonging the period of recovery.⁴⁷ Like BellSouth and Sprint, SBC does not propose to prolong the applicable recovery period beyond any limited period necessary to reach full recovery and does not propose to recover any additional interest costs. Rather, granting SBC's forbearance request will give meaning and substance to the Commission's "first stated policy goal" of affording all carriers a reasonable opportunity to recover their costs of implementing local number portability.⁴⁸ In each of these respects, forbearance is necessary to promote the public interest.

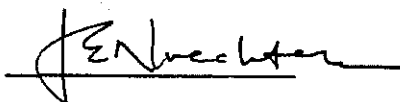
⁴⁷ *Third Report and Order* at 11777 ¶ 144.

⁴⁸ *See BellSouth Order* at 6806-07 ¶ 12.

CONCLUSION

For these reasons, the Commission should forbear from applying its rule limiting SBC's ability to recover its LNP costs through end-user charges to a five-year period and allow SBC to take the steps necessary to recover its authorized LNP costs.

Respectfully submitted,



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Counsel for SBC Communications Inc.

February 8, 2005

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of SBC Communications Inc.)	WC Docket No. 05-____
For Forbearance Under 47 U.S.C. § 160(c))	
From the Application of the)	
Five-Year Recovery Period for)	
Local Number Portability Costs)	
Under 47 C.F.R. § 52.33(a)(1))	

DECLARATION OF JOHN G. CONNELLY

I. INTRODUCTION AND QUALIFICATIONS

1. My name is John G. Connelly. I am employed by SBC Communications Inc. ("SBC") as Executive Director – Business Planning. My business address is 175 E. Houston, Room 9-H-60, San Antonio, Texas 78205.
2. As Executive Director – Business Planning, I analyze the financials of SBC to provide management with an understanding of revenues and expenses.
3. I hold a Bachelor of Science degree in Accounting from the University of Missouri – Columbia. In addition, I hold a Masters in Business Administration from Indiana University – Bloomington.
4. I began working for SBC in June 1990. Since that time, I have worked in a variety of positions in SBC's Marketing and Finance Organizations, with increasing responsibilities.
5. The purpose of my declaration is to support SBC's petition by describing the process used by SBC to determine the amount of the local number portability ("LNP") costs that it seeks to recover.

II. DETERMINATION OF LNP COST UNDER-RECOVERY

6. There are two major pieces of information needed to determine the LNP cost recovery shortfall: 1) the Commission-approved cost of implementing LNP; and 2) the LNP revenue received from end users and CLECs through authorized LNP surcharges.

7. For purposes of this petition, the cost of implementing LNP is that contained in the Commission-approved LNP tariffs for the Ameritech Operating Companies ("Ameritech"), Pacific Bell, and Southwestern Bell Telephone Company ("SWBT"). In total, the Commission approved about \$1.275 billion for recovery.

8. The costs to be recovered were established after thorough review and adjustment of SBC's cost studies by the Commission Staff. Although the Commission authorized SBC to recover \$1.275 billion, SBC estimates, based on a preliminary analysis, that it actually incurred LNP costs in excess of that amount. However, SBC is not requesting recovery of any additional costs in this petition. The petition requests recovery only of the costs approved by the Commission in 1999.

9. SBC identified the LNP revenue received from end users and CLECs using Uniform Order Service Code and revenue codes specific to LNP surcharges, which were then reconciled to the General Ledger. In total, SBC received about \$1.027 billion in LNP revenue, yielding a \$248 million shortfall from the \$1.275 billion cost figure approved by the Commission.

10. During the five-year recovery period, SBC did not impose the LNP surcharge on certain customers because of limitations in their service contracts with SBC or due to billing errors. During the internal review process to calculate its LNP revenue

shortfall, SBC determined that \$37 million of the total shortfall was attributable to these situations.

11. Subtracting this \$37 million from the \$248 million shortfall yields \$211 million, which is the amount that SBC seeks to recover through this petition. This shortfall reflects \$63 million for Ameritech, \$41 million for Pacific Bell, and \$107 million for SWBT.

III. CAUSE OF LNP COST UNDER-RECOVERY

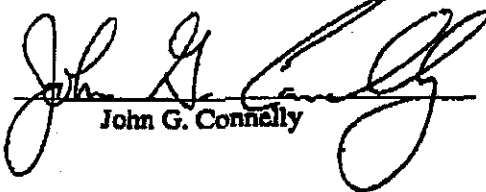
12. The cause of this under-recovery is simple. The LNP surcharges that SBC was authorized to collect were based on the assumption that the number of SBC customers (as measured by access lines) subject to these charges would increase during the authorized five-year recovery period. When the LNP cost studies were being developed in early to mid-1999, the number of access lines was expected to continue increasing through 2004. However, unforeseen factors such as the rapid growth of wireless and broadband services and a general downturn in the economy caused an unanticipated access line decline beginning in 2000. The difference between the access line growth projections in the 1999 LNP cost studies and the actual access line losses that occurred over the 1999-2004 period caused the LNP surcharge to apply to many fewer lines than SBC had projected and thus, in turn, produced SBC's cost-recovery shortfall.

13. This concludes my declaration.

DECLARATION OF JOHN G. CONNELLY

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30 day of February, 2005.


John G. Connelly

CERTIFICATE OF SERVICE

I, John Meehan, do certify that the foregoing Petition of SBC Communications Inc. for Forbearance was served on the following persons by hand delivery this 8th day of February, 2005:

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Commissioner Jonathan S. Adelstein
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John Meehan